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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 1024

MIKHAIL NICHOLAS GORIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1025

HAFIS SALICH, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals
(R. 710-736) is not yet reported.

JURISDICTION

The judgments of the Circuit Court of Appeals
were entered April 22, 1940 (R. 736, 738). The

petition for writs of certiorari was filed May 21, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

Whether the Circuit Court of Appeals properly construed Sections 1, 2, and 4 of Title I of the Espionage Act, upon which the indictment was predicated, and whether, so construed, these sections are invalid because they fail to prescribe a sufficiently definite standard of guilt.¹

STATUTE INVOLVED

Sections 1, 2, and 4 of the Espionage Act of June 15, 1917, are printed in the Appendix, *infra*, pp. 8-11.

STATEMENT

On January 11, 1939, an indictment in three counts was returned against the petitioners and another² in the District Court for the Southern District of California (R. 2-8). The first count charged a violation of clause (b) of Section 1 of the Espionage Act (Appendix, *infra*, p. 9); the second count a violation of Section 2 (Appendix,

¹ However, this Court, we submit, is not required to consider these questions for the reason stated in the Argument (*infra*, pp. 4-7).

² The codefendant (the wife of petitioner Gorin) was acquitted on all three counts (R. 462).

infra, pp. 10-11); and the third count a conspiracy to violate Section 2, in violation of Section 4 (Appendix, *infra*, p. 11). The first count (R. 2-3) alleged that the defendants, for the purpose of obtaining information respecting the national defense, and with intent and reason to believe that the information to be obtained was to be used to the injury of the United States and to the advantage of a foreign nation, did copy, take, make and obtain certain documents, writings and notes connected with the national defense, i. e., confidential information, reports, instruments, documents and writings pertaining to and concerning various and numerous individuals under suspicion, observation, surveillance and investigation, belonging and contained in United States Naval Intelligence files and reports, which were described by number. The second count (R. 4-5) alleged that the defendants communicated, delivered, and transmitted to the defendant Gorin, as a representative of a foreign nation, various documents, writings, notes, instruments and information relating to the national defense, describing the same Naval Intelligence reports as were enumerated in Count 1. The third count (R. 5-8) alleged that the defendants conspired to communicate, deliver, and transmit to a foreign power and to Gorin as its representative, documents, writings, plans, notes, instruments, and information relating to the national defense, i. e., confidential reports, etc.,

contained in the files of the United States Naval Intelligence.

Each of the petitioners was found guilty on all three counts (R. 32, 462). The petitioner Gorin was sentenced to two years' imprisonment and a \$10,000 fine on the first count and to six years' imprisonment on each of the other counts, the terms of imprisonment to run concurrently (R. 35-36). Petitioner Salich was sentenced to two years' imprisonment and a \$10,000 fine on the first count, and to four years' imprisonment on each of the other two counts, the terms of imprisonment to run concurrently (R. 37-38). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgments of conviction were unanimously affirmed (R. 710-736, 738):

The petitioners concede that there is no substantial dispute concerning the facts (Pet. 3). The evidence was reviewed at length in the opinion of the Circuit Court of Appeals (R. 711-717), and need not be here repeated.

ARGUMENT

As is apparent from the opinion of the Circuit Court of Appeals, the petitioners contended in that court that the words "respecting the national defense" and "connected with the national defense", as used in Section 1 of Title I of the Espionage Act, and the words "relating to the national defense," in Section 2, should be limited in their application to the places and things spe-

cifically enumerated in clause (a) of Section 1 and that, unless so limited, the statute would be unconstitutional for indefiniteness. The Circuit Court of Appeals held that the words "national defense" should not be so limited; that they were used "in a broad sense with a flexible meaning"; and that the statute was not unconstitutional as thus construed (R. 724, *et seq.*). The petitioners contend in their petition for writs of certiorari that the Circuit Court of Appeals erred in its decision upon these questions and that the questions are of such public importance as to require review by this Court.

While the Government is of the opinion that the questions were correctly decided by the Circuit Court of Appeals, it submits that it is not necessary for this Court in the instant case to pass upon them. The petitioners concede in effect that the Act is constitutional if it is so construed as to make it a crime only when the information obtained or disclosed relates to the places and things specifically enumerated in clause (a) of Section 1 (Pet. 10, 16). They also admit that the trial court, in accordance with the contentions of counsel for the defendants, instructed the jury that the obtaining and disclosure of information, to come within the prohibition of the Act, must be information relating to the places and things expressly enumerated in clause (a) of Section 1.^a (Pet. 7.)

^a These instructions will be found at R. 430-432.

It is thus apparent that the case was submitted to the jury upon a construction of the statute which was in harmony with the petitioners' view as to how it should be validly construed. There is, consequently, no occasion to determine whether the statute may be given a broader construction, and if so, whether such a construction would make it unconstitutional.

The petitioners assert, however, that the favorable character of these instructions was negated by instructions leaving to the determination of the jury, as a question of fact, whether the information obtained and disclosed in the instant case "concerned, regarded or was connected with the National defense." (Pet. 7.) This assertion completely misconstrues the purpose and meaning of the latter instructions. The jury was twice expressly told that whether the information in question concerned, regarded or was connected with the national defense was a question of fact solely for determination of the jury "*under these instructions*" (italics ours) (R. 434, 438), and the jury had previously, as we have indicated, been expressly advised that the term "national defense" as used in the Act was limited to the places and things enumerated in clause (a) of Section 1.

Petitioners stress what they term the innocuous character of the information obtained from the files of the Naval Intelligence (Pet. 14, 16). Whether or not the information obtained and disclosed in fact injured the United States is, under

the statute, beside the point. If the information relates to the national defense, its obtaining and disclosure are made offenses when done "with intent or reason to believe that the information * * * is to be used to the injury of the United States, or to the advantage of any foreign nation."⁴ It is therefore evident that it is of no materiality whether the information obtained and disclosed injures this Government or redounds to the advantage of a foreign power.

CONCLUSION

Since the case presents no question which requires review by this Court, it is respectfully submitted that the petition for writs of certiorari should be denied.

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MAY 1940.

⁴ In this connection it is significant that the petitioner Gorin as a representative of a foreign nation paid a substantial sum to the petitioner Salich for the information which the latter obtained from the files of the Naval Intelligence (R. 350, 714). Also, it might well be that information which, on its face, appears to be innocuous would, because of other information possessed by a foreign nation, be of vital importance and advantage to that nation.

APPENDIX

Section 1 of the Title I of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217 (U. S. C., Title 50, Sec. 31), provides:

That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section

six of this title; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photo-

graphic negative, blue print, plan, map, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both.

Section 2 of Title I of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 218 (U. S. C., Title 50, Sec. 32), provides:

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or

communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

Section 4 of Title I of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 219 (U. S. C., Title 50, Sec. 34), provides:

If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.